The Central Law Journal.

ST. LOUIS, AUGUST 12, 1881.

CURRENT TOPICS.

The *New York Herald*, in a recent elaborate editorial, considered the subject of the "Settlement of Business Disputes by Arbitration." Though the article contained many of the misapprehensions and blunders that are to be expected when laymen undertake to deal with legal subjects, there are unquestionably some utterances in it, which may well serve as food for profitable reflection on the part of the gentlemen of the bar. Of course, no one believes that the rough and ready tribunals for the administration of a summary semblance of justice, which have been organized by the various boards of trade and chambers of commerce of the country, will even then tend to absorb the litigation of the public, and leave the courts of justice unfrequented. No civilized community will consent for any considerable length of time to have its controversies determined, and justice administered by courts which are without the power of enforcing their decrees, or otherwise than by trained specialists. The significant feature of the establishment of the system of arbitation by such bodies of merchants, is not the danger that it will by virtue of its excellence absorb any appreciable portion of the current litigation of the community, but the fact that so crude and imperfect a method of settling disputes is tolerated and receives any patronage at all. This indicates that there is, indeed, some ground for the charge made in the *Herald* editorial above mentioned, to-wit: that "the settlement of disputes by appeal to the law is altogether too slow, too expensive, too vexatious, too uncertain and too unjust to satisfy the average business man of to-day; the fact is that, while trade has kept abreast of the progress of the times, the courts are, in many things, still handicapped by the crude customs and notions of a past century." This is strong language, and we do not subscribe to it in the fullness of its meaning. We do believe that litigation is too slow, too expensive and, therefore, too vexatious to satisfy anybody. We think that the experience of counsel generally will show that the life of the average contested litigation varies from two to five years. This, in a country where a capital is turned over two or three times a year, is an absurdity. Unquestionably, much of present depression in litigation, the manifested reluctance of business men to engage in a contest, even when confident of eventual success, and the resort to such crude and antiquated devices as boards of arbitration, are due to these delays more than to any other cause. Defeat is better and cheaper than such prolonged conflicts. A rough, irregular justice, or even injustice, which is administered promptly, is better in the eyes of most practical men, than the most exact and perfect adjustment of equities embodied in a decree which comes lagging in at the end of a prolonged contest, when some of the parties are dead, others moved away and have acquired new interests. Life in this country and this century changes its aspects like a kaleidoscope, and a matter which to-day seems worth fighting for, may in a few months become of trifling importance. Why sue a debtor, when the two years necessary to obtain judgment may bring about his bankruptcy, the death of witnesses or many other contingencies which will render the labor worthless and of no avail? We are well aware that the administration of justice is a matter of deliberation, and that time is necessarily consumed in the investigation of facts and principles of law. But we are firmly convinced from experience and observation in courts of justice, that four-fifths of the delay which actually occurs is unnecessary, and serves no good purpose whatever.

So important do we consider this subject to the welfare of the profession, that we believe that the National Bar Association, at its approaching meeting during this month, could do the bar no greater service than by a thorough discussion of the matter, with a view of suggesting a method of obviating the delays which have insidiously crept into the system. How this is to be done, of course can not be discussed, even cursorily, within our limits here. We would suggest the following as points where an obvious saving of time might be effected: (1) Shortening the time between the service of process and the return of the writ. (2) Making causes triable at the return term. (3)

Limiting the discretion of courts in granting continuances. (4) Making terms of *nisi prius* courts frequent, monthly or fortnightly, in large cities. (5) Regulating the setting down of causes for trial so as to avoid, as far as possible, the cumbering of the dockets, and the detention of parties, witnesses, jurors and counsel. (6) Increasing the number of terms of appellate courts, and decreasing the length of time within which a cause must be got ready for trial. (7) Increasing the number and compensation of judges.

CONCLUSIVE EFFECT OF JUDGMENTS.

In the case of Throckmorton v. United States,[1] the court uses the following language: "There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, *interest rei publicae sit finis litum*, and *nemo debet bis vexari pro una et eadem causa*."

"If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for new trial will give appropriate relief. But all these are parts of the same proceeding; relief is given in the same suit, and the party is not vexed by another suit for the same matter. But there are admitted exceptions to this general rule—cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case—when the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced upon him by his opponent, as by keeping him away from court, or false promises of compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or when the attorney regularly employed corruptly sells out his client's interests to the other side. These and similar cases which show that there never has been a real contest in the trial, or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul a former judgment or decree, and open the case for a new and fair hearing."[2] This subsequent proceeding is necessary, where by the rules and practice of the law courts, the ordinary motion for new trial can not be entertained in the court in which the judgment was rendered in a court of equity; for, after the period has elapsed in which the court rendering judgment could grant the appropriate relief, a court of equity alone can do so, even in cases of fraud.[3]

"On the other hand" (the court say in the case of Throckmorton v. United States, *supra*), "the doctrine is equally well settled, that the court will not set aside a judgment because it was founded upon a fraudulent instrument, or perjured evidence, or for any matter which was actually considered in the judgment assailed."[4]

In the case of LeGuen v. Governeur,[5] the appellant had recovered judgment in the Supreme Court against the respondent. Afterwards the respondent filed a bill in chancery, alleging fraud in the contract for the sale of a portion of the goods, for the value of which the judgment was obtained. The court say: "The general principle, that the judgment or decree of a court possessing competent jurisdiction shall be final as to the subject-matter thereby determined, is conceded on both sides, and can admit of no doubt. The principle, however, extends further. It is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in said cause, and which they might have decided." Judge Kent, in an opinion in the same case, says: "The only cases which I can recollect as forming exceptions to this general rule, are: 1. The case of mutual

[1] 98 U. S. 615.

[2] Wells' Res Adjudicata, sec. 499; Pearce v. Olney, 20 Conn. 544; Weirich v. De Zoya, 7 Ill. 385; Kent v. Richards, 3 Md. Chy. 392; Smith v. Lowry, 1 Johns. Ch. 320; De Louis v. Mark, 2 Iowa, 55.

[3] Christmas v. Russell, 5 Wall. 290.

[4] Wells' Res Adjudicata, 499; Bigelow on Frauds, 170-172; Tovey v. Young, Prec. Chy. 193; Bateman v. Willoe, 1 Schoale & Lefroy, 291; Dixon v. Graham, 16 Iowa, 310; Cottle v. Cole, 20 Iowa, 482; Borland v. Thornton, 12 Cal. 440; Riddle v. Baker, 13 Cal. 295; R. R. Co. v. Neal, 1 Wood, 353; Greene v. Greene, 2 Gray, 361; Le Guen v. Governeur, 1 Johns. Cas. 436; Fischli v. Fischli, 1 Blackf. 360.

[5] 1 Johns. Cas. 436.

dealings between the parties when the defendant omits to set off his counter demand, and may still recover in a cross action, and 2. The case of an ejectment, in which the defendant neglecting to bring forward his title, is not precluded by the recovery against him from availing himself of it in a new suit."[6]

The exception referred to by Judge Kent, and the independent character of the defense has been in some instances carried to a length beyond the more recent decisions—as in the case of Bentley v. Morse,[7] when the defendant had paid the debt, but allowed judgment to go against him by default, it was held that he might recover the money back in a subsequent suit.[8]

In the case of Hendrickson v. Hinckley,[9] a bill in equity was filed to enjoin a judgment at law for reasons following, to wit: 1. That the consideration of the notes upon which the judgment was founded, was obtained through fraud. 2. On account of surprise in the production of certain evidence on trial; and 3. That the complainant held counterclaims against the plaintiff in the judgment, who resided out of the jurisdiction of the court, and asked that they might be set off against the judgment. As to the fraud set up, the court held the verdict and judgment to be conclusive. As to the matter of surprise, the court held that a motion for delay, or for a new trial in the court in which the trial was had, if made, afforded a complete remedy. And as to the claim of set-off, the court held that as the complainant had purposely omitted to set off those claims in the action at law, and having made his election to retain them for a separate action, he must abide by the election so made, and used this language: "Courts of equity do not assist those whose condition is attributable only to want of due diligence, nor lend their aid to parties, who, having had a plain, adequate and complete remedy at law, have purposely omitted to avail themselves of it.[10] It is laid down in some of the text-books, that the court of equity obtains its jurisdiction over the subject matter of judgments fraudulently or unconscientiously obtained solely by its power over the parties to the judgment, and not over the judgment itself.[11] This doctrine without qualification might be construed so as to give a court of equity jurisdiction whenever it might have the parties within its jurisdiction, regardless of the locality of the court having exclusive jurisdiction of the judgment, which is, I think, contrary to the spirit of the law. In the early days it was declared that "fraud upon a court, in obtaining a judgment or sentence, can only be examined by the court where the fraud was committed, or another having concurrent jurisdiction."[12]

In the case of Brown v. The County of Buena Vista,[13] the court says: "The power of a court of equity to relieve against a judgment upon the ground of fraud, in a proceeding had directly for that purpose, is well settled. The power extends also to accident and mistake."

One of the reasons urged against the exercise of the power of a court of equityin one State to enjoin the execution of judgments in another State, is the principle just laid down, and which is clearly within the general doctrine of comity observed in courts.[14]

Wherefore the rule doubtles is that, where possible, the application shall be made to the court having control of the case for relief from the result of fraud, accident, mistake or surprise in the conduct of the cause, if knowledge of such fraud, accident and mistake is obtained in time for such application; otherwise the application to a court of equity will be unavailing; for it is one of the most essential prerequisites of equity jurisdiction, especially in the matter of interference in

[6] Cooper v. Martin, 1 Dana, 23; Grant v. Button, 14 Johns. 377; Loomis v. Pulver, 9 Johns. 244; White v. Ward, 9 Johns. 232; Battey v. Button, 13 Johns. 187; Canfield v. Mungor, 12 Johns. 347; Holden v. Curtis, 2 N. H. 61; Tilton v. Gordon, 1 N. H. 33; Thatcher v. Gammon, 12 Mass. 268; Homer v. Fish, 1 Pick. 435; Holmes v. Avery, 12 Mass. 136; Shriver v. Commonwealth, 2 Rawle, 206.

[7] 14 Johns. 468.

[8] Whitcomb v. Williams, 4 Pick. 228; Cobb v. Curtis, 8 Johns. 470; Lazell v. Miller, 15 Mass. 207; Miner v. Walter, 18 Mass. 238; Fowler v. Shearer, 7 Mass. 14; Rowe v. Smith, 16 Mass. 306.

[9] 17 How. 243.

[10] Barker v. Elkins, 1 Johns. Chy. 465; Green v. Darling, 5 Mason, 201.

[11] 2 Story Eq. Jur., sec. 895; Pearce v. Olney, 20 Conn. 544; Hilliard on New Trials, 454.

[12] Meadows v. The Duchess of Kingston, Ambler's Rep. 756.

[13] 95 U. S. 157.

[14] Bicknell v. Fields, 8 Paige. 440; McRae v. Mattoon, 13 Pick. 53; Field v. Gibbs, 1 Pet. C. C. 155.

proceedings at law, that there is not and has not been any mode of relief in the law courts. Any failure to avail himself of the remedies afforded by the law courts would, unless he was prevented by an excusable ignorance of the facts, or because he was prevented from making use of such facts, amount to such a want of diligence as would prevent such interposition of the equity court.[15]

In other words, he must show that he was ignorant of the defense at the trial, or that his defense could not have been received,[16] and that he has used due diligence in making use of the same both before and after trial, both of which are essential to a standing in a court of equity.

A. L. MERRIMAN.

REMOTENESS OF CONSEQUENTIAL DAMAGE.[1]

IV.

The principle last adverted to, in reference to the intervention of a third person's act,[2] has given rise to much controversy in relation to the liability of a person who utters a slander, for damages caused by its repetition by other persons. If the slander is not uttered to one whose duty or moral obligation[3] it is to report it, and the repetition is otherwise unauthorized, the injury which follows is too remote as a ground of damage, according to the well-known case of Ward v. Weeks;[4] but, said the late Chief Baron Kelly, in Riding v. Smith,[5] "I hope the day will come when the principle of Ward v. Weeks, and that class of cases, shall be brought under the consideration of the court of last resort, for the purpose of determining whether a man, who utters a slander in the presence of others, is not responsible for all the natural effects which will arise from those persons going about and repeating the slander, though without any express authority on his part." Certainly, as Mr. Mayne well observes, "if that is natural which is in conformity with human nature, every one who utters a slander may be perfectly sure that it will be repeated. If he wishes to make the repetition certain, he has only to impose a pledge of secrecy on his hearers." Nothing he can do, in fact, can prevent the mischief he has caused from spreading, and increasing as it spreads, for increment is no less natural and inevitable than diffusion. Its progress is graphically described in the "Barber of Seville:" "First, a little humming sound, skimming the ground like a swallow before the storm; pianissimo, pianissimo, murmuring and buzzing, and spreading the poison as it goes. A breath catches it up; piano, piano, it glides into your ear adroitly. The harm is done; it takes root; it climbs, it travels, and rinforzando, from mouth to mouth, it travels like the devil. Then, all at once—you hardly know how—you see it raising its head, hissing, swelling itself out, growing monstrous under your very eyes. It rises, takes its flight; whirls round you, surrounds you, clutches you, drags you along, bursts forth and thunders, and becomes, Heaven help us! a general shriek, crescendo, a universal chorus of hatred and proscription." And the futility of attempting to impedite this progress is impressively illustrated by the lesson that was once given by St. Philip Neri to a penitent detractress. "For your penance do as follows," said he; "go to the nearest market, purchase a chicken just killed and still covered with feathers; you will then walk to a certain distance, plucking the bird as you go along; your walk finished, you will return to me." She performed her task, and returned to him, anxious to tell of her exactness in its accomplishment, and desirous to receive some explanation of a

[15] Creath's Admr. v. Simms, 5 How. 191; Sample v Barnes, 14 How. 70; Walter v. Robinson, 14 How. 584; Brown v. County of Buena Vista, 95 U. S. 157; Bateman v. Willoe, 7 Sch. & Lef. 201; Massy v. Graham, 6 Paige, 622; Callaway v. Alexander, 8 Leigh, 114; Powell v. Stuart, 17 Ala. 719; Biddle v. Barker, 13 Cal, 295; Story Eq. 105, 146, 895, 896, 1025a; High on Inj., 97, 85, 114; Marriatt v. Hampton, 7 Term, 269; Small v. Preston, Chy. Ca. 65; Eden on Inj., sec. 64, note 2; Duncan v. Lyon, 3 Johns. Chy. 351; Marine Ins. Co. v. Hodgson, 7 Cranch, 332.

[16] Lansing v. Eddy, 1 Johns. Chy. 50; Dunham v. Downer, 31 Vt. 249; Gott v. Carr, 6. G. & J. (Md.) 309; Delly v. Barnard, 8 G. & J. (Md.) 170; Brewster v. McCawley, 7 Gill, 147; Marine Ins. Co. v. Hodgson. 7 Cranch, 336; Baker v. Elkins, 1 Johns. Ch. 466.

[1] See 12 Cent. L. J. 534, 583, and 13 Cent. L. J. 86.

[2] See Bowen v. Hall, 6 Q. B. D. 333; 44 L. T. N. S. 75, with which compare Couper & Sons v. Macfarlane, 6 S. C. 683; Mapstrick v. Ramage, 14 Ir. L. T. 73.

[3] Derry v. Handley, 16 L. T. N. S. 263, which Mr. Mayne is rather remiss in not citing.

[4] 7 Bing. 211.

[5] 1 Ex. D. 94; see com. 12 Ir. L. T. 84.

penance so singular. "Ah!" said he, "you have been very faithful to the first part of my orders; now do the second. Retrace your steps; pass through all the places you have already traversed, and gather up one by one all the feathers you have scattered." "But, Father," exclaimed the poor woman, "that is impossible. I cast the feathers carelessly on every side; the wind carried them in different directions; how can I now recover them?" "Well, my child," he replied, "so it is with your words of slander—like the feathers which the wind has scattered, they have been wafted in many directions—call them back now if you can. Go, and sin no more." But the doctrine of Ward v. Weeks fails to take into account the very nature and essential attributes of slander, and imposes no legal penance on Thersites for the worst consequences of his malevolence—consequences "such as, taking human nature as it is, with its infirmities" (in the words of Christian, J., in Lynch v. Knight,[6] there approved by Lord Wensleydale), "might fairly and reasonably have been anticipated and feared," even though "not what would reasonably follow, or we might think ought to follow;" while, if it be said that the repetition is the wilful or illegal act of a third person, which the law will not imply or recognize as a natural or probable consequence, we "can not agree" (again to apply the words of Christian, J.,) that the law should require such damage to be strictly "the natural and legal consequence of the words," and in so doing the law would (to apply the words of Brett, L.J., in Bowen v. Hall) "refuse to recognize what is manifestly true in fact," and maintain "an implication contrary to manifest truth and fact."

Be this as it may, we find that Ward v. Weeks, so far from being overruled, has been followed in Hirst v. Goodwin,[7] (not cited by Mr. Mayne) and in the recent case of Clark v. Morgan,[8] (where, also, Hirst's case was not cited, while neither it nor Clark's case is mentioned in Mr. Flood's recent treatise on defamation), as well as in the case (which we do not find elsewhere noticed) of Gough v. Goldsmith,[9] which came before the Supreme Court of Wisconsin on demurrer, in 1878. There it appeared that the defendant had written to the Rev. Mr. Connolly, a Catholic priest, begging him, as a special favor to the writer, to avoid all familiarity with the plaintiff (and other persons named) because he (the plaintiff) is no longer a Catholic, is a member of secret societies, and does not go to his Easter duty. The writer then added, "I understand they" (the persons named) "did the honors at your visit. I have a number of respectable Irish Catholics who felt hurt at the forwardness of those, as they call them, 'renegade Irishmen.' Pat Morris is the only one of them who attends his church, and he is mighty small and mean." The plaintiff was an attorney, and it was averred that, in consequence of the receiver allowing this letter to be read by various persons, the plaintiff had been shunned and avoided by his neighbors, and former clients refused to give him business. "In Terwilliger v. Wands,"[10] said Cole, J., "the doctrine is laid down that, 'where words are spoken to one person, and he repeats them to another, in consequence of which the party of whom they are spoken sustains damages, the repetition is, as a general rule, a wrongful act, rendering the person repeating them liable in like manner as if he had alone uttered them. The special damages, in such a case, are not a natural legal consequence of the first speaking of the words, but of the wrongful act of repeating them, and would not have occurred but for the repetition, and the party who repeats them is alone liable for the damages.[11] It seems to us that the same principle must govern in respect to the special damages stated in this case. The libel was not read by any persons who refused to employ the plaintiff or give him their business, at the request or by the directions of the defendant, but was read by such persons through the voluntary act of Connolly, for whose action the defendant is not responsible. And within the rule of law above stated, as the special damages laid were not the direct and immediate, but the remote and secondary consequence of the publication of the libel, the defendant is not answerable for them."

[6] 9 H. L. Cas. 577; 8 Jur. N. S. 724; 5 L. T. N. S. 291.
[7] 3 F. & F. 257.
[8] 38 L. T. (N. S.) 354.
[9] 18 Alb. L. J. 266.
[10] 17 N. Y. 50.
[11] Ward v. Weeks, 7 Bingh. 211; Hastings v. Palmer, 20 Wend. 225; Kernhalts v. Becker, 3 Denio, 346; Stevens v. Hartwell, 11 Metc. 542.

It should be observed that it was not alleged that Mr. Connolly himself, in consequence of receiving the letter, had withheld business from the plaintiff; and, also, that the letter was not in itself actionable, apart from special damages.[12] We find the same doctrine affirmed in another recent American case,[13] which was not referred to in Gough v. Goldsmith. In Prime's case evidence had been admitted that, because of the speaking of the slanderous words, there was a rumor in the neighborhood in reference to the charge against the plaintiff; and the jury were instructed that they might consider the extent of the publication as how far known, and now understood and believed in the community where known, so as to determine the extent of the injury to his reputation. The verdict, had for the plaintiff, was reversed, because the effect of receiving this evidence and of the instruction given was to hold the defendant liable to the extent to which the plaintiff was injured by the publication by others, "without reference to the circumstances under which the repetition was made." The meaning of this is that it might have been shown that the repetition was not "wrongful" (but the existence of the rumor would not, *per se*, justify repetition)[14]; for in one respect some of the American decisions (as noticed by the latest English writers on the law of libel, but not citing the above) differ from ours on this subject—viz., in holding that if the repetition was not in itself wrongful (as if uttered without malice and on a privileged occasion), the originator would be liable for the consequent damages;[15] whereas under the English rule to the contrary,[16] the injured person would have no redress, the repeater being innocent, and the originator not having proximately caused the damage. Let us now suppose a case: A speaks into a phonograph defamatory words of and concerning B, and makes his exit leaving the instrument loaded. Enter C, who causes the malicious little gossip to articulate its imputation. Assume various circumstances—as that no one was present when A spoke, though others were present when C made the phonograph publish the slander; that C acted innocently, or else with *malice prepense*; that the words were not actionable without special damage, but that such ensued on the repetition by the act of C; that the phonograph was in A's private laboratory, and he had no reason to anticipate the act of C, or that it was in a public exhibition, to which after A's exit C entered. Is A liable to B, and to what extent?—*Irish Law Ttmes.*

[12] See per Martin, B., in Dixon v. Smith, 5 H. & N 450; Mayne on Dam. 3d. ed., 66.
[13] Prime v. Eastwood, 5 Cent. L. J. 282.
[14] Watkin v. Hall, L. R. 3 Q. B. 396.
[15] Kernhalts v. Becker; Terwilliger v. Wands, *ubi supra.*
[16] Knight v. Gibbs, 1 A. & E. 43; Parkins v. Scott, 1 H. & C. 153, 31 L. J. Ex. 331.

RAILROAD MORTGAGE — FUTURE ACQUISITIONS.

MISSISSIPPI VALLEY CO. v. CHICAGO, ETC. R. CO.

Supreme Court of Mississtppi, April Term, 1881.

A railroad mortgage which in general terms includes future acquisitions will not affect any property of the railroad company subsequently acquired, except such as is appurtenant to and necessary for building and operating the road and carrying out the purposes for which it was created.

Appeal from the Circuit Court of Pike County.

CHALMERS. C. J., delivered the opinion of the court:

This is an action of ejectment in which plaintiff claims title by virtue of an execution sale under a judgment against the former owner of the property, and defendant claims under a mortgage executed by the same owner. The mortgage was prior in date to the judgment, and if operative on the property here involved, takes precedence to it. The property was not owned by the mortgagor (The New Orleans, etc. R. Co.) at the date of the mortgage, but it is claimed that it passed as after-acquired property by virtue of the terms of the instrument.

Whether it did so pass is the question presented. The granting clause of the mortgage conveys, or attempts to convey, all the property of the railroad then owned or subsequently acquired, in these words: "All of its right of way, lands, property, franchises, rights and appurtenances, and also all the buildings, structures and improvements thereon, and all and singular the cars, locomotives, engines, wharehouses, depots, machine shops and machinery, fixtures, utensils and effects of every kind, nature and description whatever in use upon the said railroad way, or in any wise attached or appurtenant to the same, intending hereby to include all its present real and personal estate and franchises, now owned or hereafter to be acquired, without any exception or reservation what-

ever." Are the words "intending hereby to include all its present real and personal estate and franchises, now owned or hereafter to be acquired, without any exception or reservation" sufficiently definite and descriptive to pass the after-acquired property of the corporation? Certainly they are broad and comprehensive enough, but are they not too much so? That a natural person or a corporation may mortgage property to be subsequently acquired, is now too well settled to require elucidation or citation of authorities. But neither by one nor the other can this be accomplished, by words of a character so vague and general as to afford to creditors and subsequent purchasers no notice whatever of the property to be embraced. A very different rule obtains where future acquisitions are attempted to be mortgaged, from that which exists with reference to property then owned by the grantor. A man or a corporation may well mortgage "all its property then owned" without further words of description, because the fact of present ownership serves as an indicator to point to and identify the property. But neither a man nor a corporation by general terms only can mortgage, so far as subsequent purchasers and creditors are concerned, every thing that it may thereafter acquire through all time; for this would be a mere pledge of its capacity of acquisition, and would afford no sort of indication of what was to pass under the instrument. A deed "of all my estate," or "all my property," is good. Wilson v. Boyce, 92 U. S. 320. But a deed "of all the estate that I may hereafter acquire" is a nullity, and while a court of equity might perhaps enforce a mortgage of such a character as between the parties after the acquisition of the property, it would be utterly void as to third persons.

A distinction is made by some of the authorities between mortgages of future acquisitions executed by railroad companies, and similar instruments made by natural persons. It is said that a mortgage of a railroad and its future property will carry all after-acquired property appurtenant to and necessary for building and operating the road, and carrying out the purposes for which it was created; while a similar instrument will be inoperative if executed by a private person. This is true, if the mortgage executed by the private person is upon a specified piece of property without reference to any accretion or addition to it; because there can be no accretions of property appurtenant to the person of the mortgagor; but it is untrue, if the individual has mortgaged his business and the property there appurtenant to, or afterwards to grow out of and be added by accretion to the particular business that is pledged. Thus, a natural person equally with a corporation can execute a valid mortgage of a ship and the profits of its voyage, or of a factory and the machinery then in it and to be placed in it, or of a farm and the products to be produced upon it, or a flock of sheep and its natural increase and future grown wool. And so a railroad company can execute, in general terms, a valid mortgage of its road bed and franchises, and all of its real and personal property then owned or thereafter acquired; *provided*, the future acquisitions be such as belong naturally to the business of constructing and maintaining the road and its primary end as a common carrier of passengers and freights. The things which may be deemed essential or useful, and therefore appurtenant to the great work of building and operating a railroad, will frequently be more extensive and varied in their character, than those which can properly be regarded as accretions to the business of a private person; but the principle is the same, and where the facts concur, the law must be the same as to both. The mortgage in the present case would be clearly void as to after-acquired property, for uncertainty of description, if it had been executed by a private person, without reference to some enterprise, undertaking or venture as to which the future property could be deemed an accretion. It is equally so when executed by a railroad company, if the property to which it is sought to apply it was not appurtenant to the business of the company. When property is to be deemed appurtenant to a railroad enterprise, is discussed in many cases, a few of which we cite. Mosely v. Mobile, etc. R. Co., 52 Miss. 127; 12 Wise, 649; 25 Barb. 284; 47 Pa. St. 465; 24 Ohio St. 28; 22 N. Y. 494. In Pierce v. Emery, 32 N. H. 484, it was held that, after-acquired property, where appurtenant, would pass by a mortgage of a railroad and its business, although there was no provision as to future property. This doctrine is denied, and we think properly, by the better considered cases.

The property involved here does not fall within any well-considered definition of the term appurtenant, nor can it possibly be regarded as either necessary or legitimate to the business of a railroad corporation. It consisted of a hotel, a brick store-house, some vacant town lots and a farm of three hundred acres. The hotel was not used as a railroad eating-house, there being no station-house or depot at the town, but seems to have been used as an ordinary hotel for the entertainment of guests. The other property was rented out for the several purposes for which it was adapted. It was used for these purposes by its former owners, before its acquisition by the R. R. Co., and continued to be so used after that acquisition. It was applied to no new use, and except that after its acquisition the several tenants occupying it paid rents to the railroad company, it served no beneficial purpose whatever to the railroad. Clearly, it was not appurtenant to it. It is urged, however, that the company making the mortgage was authorized by its amended charter to acquire this property; that this amended charter had been granted by the legislature before the execution of the mortgage; and that therefore, while the language used in reference to after-acquired property would be too vague, if used by a private person or a corpora-

tion ordinarily, it will be sufficient, when used by *this* corporation, and will cover all the property that it was by its charter authorized to hold. The amended charter was enacted with reference to a proposed extension of the railroad from Canton to Aberdeen. For this purpose it vests the company with the right to acquire and hold "at each termination of said railroad, and at any other place along the line of said railroad, or in the vicinity thereof, any quantity of land not exceeding in any one place five hundred acres, to be used for all necessary purposes of said railroad, or to be disposed of at pleasure for the purpose of constructing and maintaining said railroad." We entertain serious doubts whether this act authorized the acquisition of real estate anywhere except "at the terminations" of the proposed extension, to-wit, at Canton and Aberdeen, or along the line of the road to be built between those terminations. The land here involved lies more than a hundred miles below Canton, and along that portion of the road which had been completed years before the passage of this act. But conceding that the act authorized the purchase of land all along the line, both of the completed and of the uncompleted portion, from the Louisiana State line to the town of Aberdeen, then it is safe to say that it would justify the acquisition of a million acres of land. For what purpose was this enormous amount of land to be obtained and used? Either "for all necessary purposes of said railroad," or "to be disposed of at pleasure for the purpose of constructing and maintaining said railroad." If it was to be bought and used "for necessary purposes," then it was to become appurtenant to the road; but we have seen that the property here involved was not so bought or used, but on the contrary, it was, when bought, and it thereafter remained dedicated to purposes utterly foreign to the business of a common carrier.

If, on the contrary, we are to understand, that by the words "to be disposed of at pleasure for the purpose of constructing and maintaining said railroad," the company was empowered to buy this immense quantity of land scattered along a line of three hundred miles, situated in many counties, and with no restrictions except that it should be in five-hundred acre tracts, and in the vicinity of the road, it follows that the company was vested with power to enter the market generally as a purchaser, holder and speculator in real estate. It might become the owner of plantations and factories, and of entire towns and villages, and buy and sell and lease lands applied to every use known among men; nor would it be bound to dedicate them, after they were acquired, to any purpose whatever connected with its business as a common carrier. It would differ, therefore, as to such lands, in no respect from a private person, so far as its right either of acquisition or disposition was concerned; and hence there must be applied to its conveyances the same rules of construction as if they were made by private owners. It follows that as the mortgage of the after-acquired property would have been void as to third persons, if made by a private person, it is equally so as to the lands here involved, though made by a railroad company. The case of Calhoun v. Paducah R. R., 9 Cent. L. J. 66, is quite in point; and the opinion of Hammond, J., of the United States District Court for the Western District of Tennessee, compensates by its learning and ability for any lack of authoritative character in the tribunal.

There is no merit in the objection that even though the mortgage was not operative on the land, plaintiff obtained no title to it under the sheriff's sale, because at the time it occurred, the property was in the hands of a receiver, appointed in the proceedings for foreclosing the mortgage. The receiver was not ordered to take possession of this land specifically, but was only directed to take charge generally of the property embraced in the mortgage; and nowhere in the proceedings was this land specifically alluded to, until the filing of the receiver's inventory, more than a year after the sale by the sheriff under execution and the purchase of the property by the plaintiffs. The receiver never took visible possession of the property, except by receiving rents from the tenants previously in possession; nor was anything done to admonish the public that this property was claimed as being embraced in the mortgage.

Under these circumstances, as the property was not embraced in the mortgage, the purchaser at the execution sale got a good title.

Judgment reversed, and judgment here on the agreed state of facts for plaintiffs.

LIMITATIONS — PART PAYMENT BY SURETY.

McCONNELL v. MERRILL.

Supreme Court of Vermont, October Term, 1880.

1. It is not necessary that the payment should be made from the funds of the party making it, to arrest the running of the statute; it is sufficient if he procures it to be done.

2. Where the surety procures a payment to be made, though out of the funds of the principal, and promises to pay the balance of the note, such, in effect, is payment by the surety himself.

3. Bailey v. Corliss, 51 Vt. 366, where the party, making the payment, acted as the agent of another signer of the note, distinguished.

4. Gen. Sts. ch. 63, sec. 28, as to the effect of payment by one of two joint contractors, construed.

This case was tried at the June Term, Orange County Court, 1879, POWERS, J., presiding. It was an action of general assumpsit brought upon the following note.

$781.00. Bradford, Vt., March 31, 1869.

For value received we promise to pay Albert S.

McConnell, or bearer, seven hundred and eighty-one dollars on demand with interest annually.

[Signed] IRA A. MERRILL,
B. L. WORTHLEY.

The defendant Merrill was defaulted; the defendant Worthley plead the statute of limitations; replication, new promise, *infra sex annos*. It appeared that payments had been made from time to time upon said note, which were indorsed upon said note, until Nov. 19, 1877, on which day a payment was made and indorsed by the plaintiff upon the note. The making of this last payment in the way, and under the circumstances, under which it was made, was relied upon by the plaintiff to save the note from the bar of the statute, as to defendant Worthley. The defendant Worthley gave evidence which established his plea of the statute, unless the bar was removed by the evidence offered by the plaintiff, as recited hereinafter. The writ was dated July 24, 1877, and was served December 6, 1877. The plaintiff offered to show that after this suit was brought, and defendant Worthley's property attached therein, the defendant Worthley sent to the plaintiff and requested him to bring a second suit against both defendants, and therein attach the property of defendant Merrill, and have the same sold and the proceeds applied to the note; and verbally promised the plaintiff that he (Worthley) would pay all the expenses of such second suit, and the sale of property therein, and have the proceeds indorsed upon said note, and would pay the balance due upon the note; that Worthley wanted such second suit brought for his own benefit; that after much urging the plaintiff consented, and the parties went to Mr. Darling's office and had the suit brought; that Merrill's property was attached and sold upon the writ, and the proceeds of the sale, without any deduction for costs or officer's fees, was indorsed upon the note November 19, 1877, by Worthley's direction; that the indorsement shows the full amount of the proceeds of Merrill's property sold upon the writ; that nothing was deducted from such proceeds to satisfy the fees of the officer, amounting to $6.20.

Counsel for the plaintiff stated his claim as follows: My claim is to show that this last indorsement was made by Worthley's direction; we do not claim that he made the indorsement, but that the last payment was made by his direction, he bringing it about through this suit brought by Darling and the auction sale upon the writ. We claim it makes no difference who owned the money that was paid on the note; if it was made by Worthley, it can not be claimed that it belonged to some one else.

By the Court: "And that is the point your evidence will tend to show?" *Mr. Watson:* "Yes, that the payment was made by his direction."

By the Court: "Do you claim that the note is saved from the bar in any other way than that?" *Mr. Watson*: "No Sir; I think not. Yes, we do; there is another point; it did not occur to me at that moment. We claim that he is not let out anyhow, but that, of course, we do not need to show by evidence, because the note itself shows, and we claim that if the note was kept alive by one, that it is likewise kept alive as to the other. But we rely more particularly upon the question I have before stated, and we shall be able to show, before we get through, that the money was applied directly on the note by Worthley's orders."

By the Court: "Then, if I understand your proposition, you propose to show that the note was signed by Worthley and Merrill, and that after this suit was brought, Worthley procured McConnell to bring a suit against the other defendant, Merrill, attach his property, cause it to be sold at public auction, and the proceeds to be applied on this note in suit?" *Mr. Watson*: "Yes, your honor."

By the Court: "And that the whole proceeding was by the procurement of Worthley, and you claim that this is a payment on the note by Worthley?" *Mr. Watson*: "Yes, with all the circumstances connected with it."

By the Court: "And secondly, if that is so, that being a joint contractor with Merrill, that if Merrill has kept the note alive, it is kept alive as to Worthley?" *Mr. Watson*: "Yes, I suppose the facts of the case were that he was only surety."

By the Court: "That does not appear on the note, but that does not alter the rights of McConnell." Mr. Watson then cited some cases in support of his position.

Counsel further claimed that defendant Worthley would be estopped from claiming that the property sold and applied upon the note was a payment by Merrill. The court ruled that the application of the proceeds of sale of Merrill's property in the second suit was not a payment by Worthley, although made by his procurement and request and direction, and that his promise to pay the expense of the suit, and the balance of the note being verbal, went for nothing; that he might rely upon the statute of limitations, notwithstanding the defendant Merrill had made payment within six years; and that defendant Worthley was not estopped by the proceedings detailed touching the bringing of the second suit from making his defense, and excluded the evidence, and ordered a verdict for defendant Worthley. To the ruling rejecting the evidence offered and ordering a verdict, the plaintiff excepted; exceptions allowed, execution stayed and cause passed to Supreme Court.

John H. Watson and J. K. Darling, for plaintiff: *Farnham & Chamberlin*, for the defendant.

ROYCE, J., delivered the opinion of the court:

The only question presented by the exceptions is whether the evidence, offered of the payment made and indorsed upon the note Nov. 19, 1877, would prevent the running of the statute of limitations as against the defendant Worthley. The payment offered to be shown was made from the proceeds of the property of the defendant Merrill, and the legal effect of the payment, as affecting

the defendant Worthley, would depend upon the circumstances under which it was made. The plaintiff offered to show that after this writ was brought and Worthley's property had been attached, he applied to the plaintiff to bring a second suit, and have the property of Merrill attached and sold, and the proceeds applied upon the note, and verbally promised that he would pay all the expenses of the second suit, and of the sale of the property that might be attached in the same, have the proceeds endorsed upon the note, and would pay the balance that might remain due upon the note, saying that he wanted the suit brought for his own benefit; that plaintiff finally consented that the suit might be brought; that the property of Merrill was attached and sold upon the writ, and the whole of the proceeds of the sale endorsed upon the note Nov. 17, 1877, by Worthley's direction. The court ruled as matter of law, that these facts, if proved, would not prevent the running of the statute as against the defendant Worthley; that they would not amount to such a payment by Worthley as would prevent the running of the statute.

This we hold was error. The payment was made by the procurement of Worthley, and for his benefit, and was made under such circumstances that the creditor had a right to rely upon it as a payment made by him for the purpose of arresting the running of the statute. It is not necessary that the payment should be made from the funds of the party making it. Here the payment made was not a voluntary payment by Merrill, but was compulsory, and was procured to be made by Worthley; and the payment thus made, when accompaaied by the promise of Worthley that he would pay the balance of the debt that might remain due, we think the creditor had a right to consider it as a payment made by Worthley. This view in our judgment harmonizes with the spirit and intent of the statute, while the adoption of the construction claimed by the defendant would operate as a fraud upon the plaintiff, and be in conflict with the theory of the law pertaining to the defense of actions from lapse of time. This case is clearly distinguishable from Bailey v. Corliss, 51 Vt. 366. There the payment relied upon was a voluntary one. The defendant acted as the agent of the party making it, and informed the creditor at the time he handed him the money, whose it was, and what disposition he was requested to make of it, so that there was nothing in the conduct of the defendant that had a tendency to mislead the creditor, or to induce the belief that he intended to assume any new responsibility, or to waive any legal right.

The judgment is reversed, and cause remanded.

CONTRACT—PUBLIC POLICY—"GRAIN CORNERS,"

RAYMOND v. LEAVITT.

Supreme Court of Michigan, June, 1881.

A contract in furtherance of a corner in the grain market is against public policy, and will not be enforced.

Otto Kirchner and *C. A. Kent*, for plaintiff in error; *H. M. Cheever*, for defendant in error.

CAMPBELL, J., delivered the opinion of the court:

Leavitt sued plaintiff in error on the common counts, and served a bill of particulars, in which the demands were set out under different forms and items as $10,000 money lent, $10.000 handed defendants for their use on their guaranty that it should be repaid in a reasonable time, $10,000 deposited with them for their accommodation, and $2.327.53 on account stated. He recovered 3.027.53, which is claimed on the argument to have been made up by the sum of what is called an account stated, and an error of $700. The plaintiff's story on oath was that the sum of $10,000 was advanced by him in May, 1880, to defendants for the purpose of controlling the wheat market at Detroit for what is called by the parties the May deal, with a view of forcing up prices, and producing what is understood as a corner, and compelling parties who had contracts to fill to pay a higher price for wheat to fill them. Defendants, as he testified, were to give him a third of the expected profits, and to repay the $10,000 with or without profits at all events. Defendants claimed that Leavitt furnished the $10,000 as a margin for these wheat transactions, and was to bear his risks, and that the speculations resulted in a loss. At the end of July, 1880, defendants gave plaintiff three documents or statements, exhibiting transactions up to that time, in which he was treated as a party concerned in the transactions, and one of these papers showed in a brief way that at that time there was left of his share no more than $2,327.50. This is now claimed to be an account stated. Several special questions were left to the jury, and they found that there was no loan made, and that defendants, when they rendered these statements, understood the business was closed. They also negatived the giving of the money for the purpose of contracting for more wheat than could be delivered, and thus artificially raising the price. If the testimony is properly printed, it does not appear distinctly that any one swore the purpose was merely to raise the price of wheat so as to get the advantage of those who should agree to sell to defendants themselves, but rather to so raise it as to compel all persons, who had wheat to deliver to anybody, to pay larger prices. The answer given by the jury does not fully meet the testimony.

We do not understand on what basis plaintiff recovered under his bill of particulars. He never advanced to defendants any sums except two $5,000 items, amounting to $10,000. If there was any money to be returned under his bill of particulars, it could have been no less than $10,000. On the other hand, both parties repudiated the idea that they had ever agreed on the July bills or any of them, as settling the amount due from one to the other; and there can not be in law an account stated that neither party agrees to. It is impossible to support the judgment on any theory of the evidence that conforms to the demands of either party. But the defendants, both at the close of plaintiff's case and at the close of the whole testimony, asked for instructions that the plaintiff should not recover, and in our opinion they should have been given. The object of the arrangement between these parties was to force a fictitious and unnatural rise in the wheat market for the express purpose of getting the advantage of dealers and purchasers, whose necessities compelled them to buy, and necessarily to create a similar difficulty as to all persons who had to obtain or use that commodity, which is an article indispensable to every family in the country. That such transactions are hazardous to the comfort of the community is universally recognized. This alone may not be enough to make them illegal. But it is enough to make them so questionable, that very little further is required to bring them within distinct prohibition. The cases of The Morris Run Coal Co. v. Banlay Coal Co., 68 Pa. St. 173, and Arnott v. Pittston, etc. Coal Co., 68 N. Y. 558, held contracts, involving similar dealings with coal, to be against public policy. And we think the reasoning of those cases is based on familiar common-law principles, which apply more strongly to provisions than to any other articles. There is no doubt that modern ideas of trade have practically abrogated some common-law doctrines which are supposed to unduly hamper commerce. At the common law there is no doubt such transactions as were here contemplated, although confined to a single person, were indictable misdemeanors under the law applicable to forestalling and engrossing. Some of our States have abolished the old statutes which were adopted on this subject, and which were sometimes regarded as embodying the whole law in such cases. Where this has been done, as in New York, the statutes have replaced them by restraints on combinations for that purpose, leaving individual action free. In England there have been several statutes narrowing or repealing all of the ancient statutes, and more recently covering the whole ground. But so long as the early statutes only were repealed, it was considered that enough remained of the common law to furnish combinations to enhance the value of commodities. And when this doctrine became narrowed, it seems to have been considered that such combinations to enhance the price of provisions remained under the ban. In Rex v. Waddington, 1 East, 143, and S. C., 1 East, 167, it was held the common law was still in force to punish engrossing the necessaries of life or provisions by single persons. The chief difficulty was in determining whether hops came within that rule, and it was held they did, and that the legislature only could change the law. The defendant was heavily fined. That case has been sharply criticised as not in harmony with modern political economy, and it no doubt goes beyond what would be considered proper among us. It has never, so far as the researches of Mr. Bishop have gone—and he seldom overlooked important cases,—been judicially disproved, although statutes have been made to change the rule. See 1 Bish. Cr. L., §§ 527, 528, and notes to 6th Ed. And he intimates that conspiracies for such purposes may perhaps be punished, even where the individual offense has been abolished. See, also, vol. 2, §§ 202, 206, 216, 220, 230, 231 and notes. In Rex v. Hilbers, 2 Chitty, 163, it was held that there must be a combination of more than one person, before an information will be granted for enhancing the price of necessaries.

Mr. Russell gives it as his opinion that in our day single offenders would not be regarded as punishable, unless their offense relates to provisions. 1 Russ. 170. But where there is a conspiracy, the law has been given a much wider application, and the case of Rex v. De Berenger, 3 M. & S. 67, has obtained celebrity from the high rank of the offenders who were convicted (and one of them at least, Lord Cochrane, unjustly) of conspiring to raise the price of stocks by false rumors. We have not referred to these cases to assert the propriety of enforcing common-law criminal penalties contrary to the general understanding of the business community. While these offenses have never been abolished in this State by statute, and might theoretically be, therefore, within the possible range of our laws, there would be no toleration of their strict prosecution against single persons to the common-law extent as crimes. But the general sentiment has not led to any change in legislation as to the legal propriety of allowing every species of produce gambling to be made susceptible of enforcement by contract. We must wilfully shut our eyes, before we can fail to see that a combination between a man who furnishes money, and dealers who manipulate the market where the money invested is but a trifling percentage of the property to be handled, and where the only intent is to produce unnatural fluctuations in prices, is entirely outside the limits of buying and selling for honest trade purposes. It is the plainest and worst kind of produce gambling, and it is impossible for any but dangerous results to come from it.

We do not feel called upon to regard so much of the common law to be obsolete, as treats these combinations as unlawful, whether they should now be held punishable as crimes or not. The statute of New York, which is universally conceded to be a limitation of common-law offenses,

is referred to in the case in 68 N. Y., as rendering such conspiracies unlawful; and this had been previously held in People v. Fisher, 14 Wend. 9, where the subject is discussed at length. There may be difficulties in determining conduct as in violation of public policy, where it has not before been covered by statutes as precedents. But in the case before us, the conduct of the parties comes within the undisputed censure of the law of the land, and we can not serve the transaction, without doing so on the ground that such dealings are so manifestly sanctioned by usage and public approval, that it would be absurd to suppose the legislature, if attention were called to them, would not legalize them. We do not think public opinion has become so thoroughly demoralized; and until the law is changed, we shall decline enforcing such contracts. If parties see fit to invest money in such ventures, they must get it back by other than legal measures.

Judgment must be reversed with costs and a new trial granted. The other justices concurred.

INSURANCE—MUTUAL BENEFIT SOCIETY —INSURABLE INTEREST.

MUTUAL BENEFIT ASSOCIATION v. HOYT.

Supreme Court of Michigan, July, 1881.

A contract of a mutual benevolent association, to pay money upon the death of one of its members to a person who has no insurable interest in the life of the member, is against public policy, and will not be enforced.

Error to Wayne.

Comely & Lucking, for plaintiff in error; *Atkinson & Atkinson*, for defendant in error.

MARSTON, C. J., delivered the opinion of the court:

The plaintiff in error is organized under chapter 94 of the Compiled Laws. The act authorizes any number of persons not less than five to organize as a corporation, for the purpose of securing "to the family or heirs of any member upon his death" a certain sum of money, to be paid out of the corporate funds, or by an assessment upon the members in the class to which the deceased belonged. The principal facts in this case are, that Isaiah Phair, on the 22d day of November, 1879, made a written application, upon one of the blank forms of the association, for a $5,000 certificate, to be made payable to Enos Hoyt. In this application Phair was asked to state "relation of the beneficiary (Hoyt) to the applicant," and the answer given thereto was "no relation." The proper medical report was made, money premium paid, and a certificate issued on the 24th day of November, a copy of which is given in note herewith.*

Phair died March 4, 1880, and at the time of his death there were but 1,135 members of the association in the class in which he was insured. The association declined to pay upon several grounds, the most important, and the only one we will consider, being that Hoyt was not a member of Phair's family or one of his heirs. As showing the relations existing between Phair and Hoyt, the testimony of the latter is given in full herewith: I am the plaintiff in this case. Phair first came to board with me in December, 1878, and stayed till April 25, 1879. He returned on September 7, 1879. He came back as a boarder, and stayed as such boarder till December 25th. Question. State whether there was any arrangement or agreement between you and Mr. Phair as to his becoming a member of the family and remaining in the family during his lifetime? Objected to by defendant as incompetent and immaterial; also incompetent to contradict the statement of no relationship set out in the application; also because the certificate purports to insure a friend, and it cannot be shown that the family relationship existed; also as irrelevant to the issue. Objection overruled. Exceptions for defendant. A. He was to live with me as long as he lived. As long as I had a home, he was to have one with me. After that he was treated as a member of the family. This arrangement was made about the time the policy was got out. I was keeping hotel at that time. Q. What, if anything, did he do around the hotel after this arrangement? A. He was not obliged to do anything. He used to do chores. Q. Seemed to take an interest in it, and work around as the rest of you? A. Just about the same. Q. Whether during that time and after this arrangement, and up to his death, he worked at your house around, doing chores as your wife would call on him? A. Yes, sir. Q. And between the two places lived with you as a member of your family? A. Yes,

* In consideration of the application for this certificate, which is hereby referred to and made part of this contract and of each of the statements therein, and in further consideration of the first payment (four dollars), receipt whereof is hereby acknowledged, and of the further payment of the semi-annual dues of one dollar, on or before the first days of July and January of each year, and upon the notice of any assessment and the prompt payment of the same (said assessment never to exceed one dollar and ten cents), during the continuance of this contract, does promise to pay to Enos Hoyt, friend of Isaiah Phair, of Jackson, in the State of Michigan, his executors, administrators or assigns, the sum of $5,000 within ten days after due notice and proof of the death of Isaiah Phair; *provided*, there be 5,000 members of the association in good standing. In case the number of members of the association shall be less, then a sum of as many dollars as there shall be members at the death of Isaiah Phair. If the above-named dues or assessments are not paid as provided for in the articles of incorporation and by-laws of this association, then this certificate shall be inoperative and void. In witness whereof, the Mutual Benefit Association has caused this certificate to be signed by its president and secretary, at its office in the city of Detroit, this 25th day of November, 1879.

GEO. C. LANGDON, President
J. W. MCGRATH, Secretary.

sir; just the same. Q. And under an agreement with you to that effect? A. Yes, sir. Q. You say he came and went, and in all respects conducted himself towards you, and you treated him, as one of the family? A. Just about the same, sir. He went away in December to Eaton Rapids, and came back the latter part of January. When he came back I needed a man; so I told him if he wanted to, I would give him $10 a month, the same as I would have to pay another man; so he stayed there as night watch until he got so sick he could not work. Q. So that from the time he came back, in addition to treating him as a member of the family, you allowed him $10 a month for some work he did? A. Yes, sir. Q. Who took care of him? A. Some of the help in the house. Q. Under whose instructions? A. Mine. Q. Who paid the bills? A. I did. Q. Who called in the doctor? A. I did. Q. Who paid them? A. I did. Q. Who paid the expenses of burying him? A. I did. Q. State whether Phair was indebted to you at the time of the issuing of the policy. Objected to for the same reasons as like testimony of the witness Foster. Objection overruled. Exceptions for defendant. A. Yes; he was owing me about $200; don't know exactly how much. Q. And if you had charged up for all you did for him after he became a member of the family, how much would he have owed you at the time of his death? A. About $600. *Cross-examination*: Phair was not in any business when he first came to my place. Did not know where he came from. He was to pay me $5 a week. He never paid me anything. He did not do anything; had no employment. I kept my account with my boarders in a large book; charged them with board, and gave credit for payments. Q. Why didn't you charge Phair with his board? A. I did have him charged with his board until after he was insured. After he was insured, I gave him his account. He was square. I gave him his bill. Q. You say you gave him a square account after the insurance? A. I gave him his bill. Yes, sir. It was just stated in the book, Ike commenced to board such a date, so much per week. I tore the leaf out, and gave it to him. Q. He never paid you anything? A. No, sir. Q. Any others around you had boarding like that? A. I had one—George Proudfit. I did not know where Phair went after he left April 5, 1879. Didn't keep any track of him. Never dunned him for my pay while he was gone. No arrangement was made when he came back in September, 1879; just came and stopped. Q. You had at the Sheridan House Mr. White (bartender) and this man (Phair) working around? A. No, sir. I did not have this man working around the Sheridan House. He was there, but not working for me. I moved from the American to the Sheridan May, 1879, and from there to the Central City House, December, 1879. When he was staying with me from December, 1878, to April, 1879, I did not charge up his board in the books. Q. You charged the other boarders? A. No, sir. I didn't have any regular boarders. Q. Why did you keep him? A. He had been so long with me. Q. From December to April, between three and four months, do you call that a long time? A. Wouldn't you call it a long time if you had a man boarding with you, and he did not pay? Q. So you kept him along, because he had not paid you? A. I kept him along so as to get my pay. When he left me at Christmas time, after the insurance, he went to Eaton Rapids in a livery barn. He earned wages, but did not pay them to me. Q. This was after he became a member of your family, wasn't it, according to your statement? A. Yes, sir. Q. When was it you tore his account out of the book and gave it to him? A. When I got the policy there; before he went to Eaton Rapids. He used to do a chore around once in a while. I have him charged with $33 for clothing—some clothes of mine had at different times. I made no charge of anything till this suit was commenced. Q. When you gave it to him, you intended it as a gift, did you? A. Yes, sir. At any time when he worked for me before he came back from Eaton Rapids, I paid him five and ten cents a chore. Q. You have charged him in this memorandum with $5 a day for taking care of him the last ten days of his life. He was only confined to his room about four days before his death, was he not? A. That is all. Q. Was it worth $5 per day for the last ten days of his life? A. Yes, sir. Worth that to have him around. Q. Why did'nt you send him to the hospital or pest-house? A. Because I had an insurance on him, and was to take care of him as long as he lived. Q. How old was he? A. Thirty-one, or thirty-two or thirty-three, I think. Q. You stated a minute ago, did'nt you, that at that time he was an able-bodied man? A. Yes, sir. Q. And you were going to take care of him all the remainder of his life for the insurance? A. I was to give him a home. Q. Was that the agreement? A. The agreement was that he was to have a home as long as I had it. He could go out and work as he had a mind to, and he could come home as he had a mind to. Q. So that, for the remainder of his life, thirty or forty years, if it might be so long, you were to give him a home at any time? A. We did not expect this man was going to live there all his life at that time. If he wanted to go to work, he could. Q. But he need not do it? A. No, sir. Q. So you agreed to board him for that insurance? A. I agreed to let him have a home. Q. Who paid for this insurance? A. I did. Q. So that for the insurance you were not only to give him a home, but you were to pay for the insurance itself? A. That was what I was to do. I don't think I swore anything before the coroner about Phair's being indebted to me. I don't recollect that the question was asked me. I understand the cause of Phair's death was congestion of the lungs. Q. What did you swear before the coroner's inquest was the cause as you understood it? A. Whisky, I think. Q. Why did you swear whisky at that time? A.

From the very fact I heard the doctors talking. Q. You knew he was a drinking man, did'nt you? A. Yes, sir. I knew he was a drinking man. I did swear before the coroner that he had free access to the bar. That meant my bar. Yes; that was true. He did have free access. Q. And from all you knew he was a drinking man at the time he was insured? A. Yes, sir. There ain't many men insured who are not drinking men. Show me one, and I will show you a white blackbird. I did swear before the coroner's jury that I paid him $10 a month and board. Q. Why did you swear to that if he was a member of your family? A. I did. Q. What for? A. For being night watch. Q. Did you swear before the coroner that he owed you anything? A. I don't recollect the question was asked me. Q. Did you swear he was a member of your family? A. I don't think the question was asked me. Q. They asked you how he was living there, and you said you were paying him $10 a month and board. You did not say he was a member of your family? A. The question was not asked me. I have been convicted several times of keeping a disorderly house. I paid all the fines I have ever been fined. Yes, sir, I was convicted once in the circuit court of keeping a house of ill-fame. Q. Did you swear before the coroner that Phair worked for you on and off for a year? A. I did. I meant that he had done chores for me on and off for a year. I paid him five or ten cents for what chores he did. Q. Do you mean to say that if he was owing you all this money, that nevertheless, whenever he did a little work, you paid him for it? A. Yes, sir.

Minutes of evidence of witness before coroner's jury here read as follows:

Deceased has worked for me about two months; has worked off and on for about a year. He acted as night watchman. Understood his complaint was whisky. He was a man who drank pretty freely. I gave him $10 a month and board. Do not know of his having a family; understand he has a brother. I also have George Proudfit insured in my favor. Mr. Hoar found Phair dead this morning. He was filling Phair's place while he was indisposed. Phair had free access to the bar. Think he drank some outside of my place. I knew he was drinking when I had him insured. Captain Proudfit has his life insurance in my favor, and I mine in his. But when it came to paying for the policy, he could not pay for mine, but I have kept his up. It was talking about this in Phair's presence the way I happened to get his policy. Q. Now, Dr. Crawford swore, Mr. Hoyt, that he attended Phair some time before the insurance, and that you paid him. Is that correct? A. Think I paid him seventy-five cents then. I was thinking that was at the American House; that is my impression. I don't remember any other time. I don't recollect how long this was before we moved from the American to the Sheridan; but I recollect paying him seventy-five cents. Q. Then you were not allowing him his board without getting any money, but you were paying his doctor's bills? A. I paid seventy-five cents. I don't know what was the matter with Phair for which the doctor prescribed. Phair was not a man of any property that I know of. Some of the clothes were furnished before the insurance. Q. So that you were not only boarding him, but giving him clothes before? A. Yes, sir; a little.

This case seems to be peculiar, and if not one of fraud, then from the very inception, it would appear at least to be delusive and deceptive. While the insurance, if such it may be called, was for $5,000, and the premium paid was for this sum, yet the actual amount was fixed by the number of members in the class to which the assured belonged, which turned out to be a little over 1,100, so that the amount to be recovered was thus cut down.

Again. The application, signed by Phair, and delivered to the company, and upon which the certificate was issued, showed clearly, and without any ambiguity or uncertainty, that the certificate to be issued was to be made payable to Hoyt, who was no relation to the applicant. The certificate, issued three days after the date of the application, referred to the application, and made it and each of the statements therein a part of the contract, and the statement, made in the certificate, was "to pay to Enos Hoyt, friend of Isaiah Phair, of Jackson, * * the sum of $5,000."

It is thus clearly apparent that the association in accepting the application, receiving the premium, and issuing the certificate, well knew that Hoyt was not a relative, and was not claimed to be a member of Phair's family or an heir, within even the most liberal construction. So that the association issued this certificate under circumstances which most strongly call upon the courts to enforce performance of their agreement, if certain imperative rules of public policy do not forbid. The defense set up in this case must be considered as that of the public and not that of the defendant, as it stands in no position to interpose such a defense. Lyon v. Waldo, 36 Mich. 333.

We need not discuss the other facts at length. The testimony of Hoyt shows that this contract was in the nature of a mere wager policy, and that his interest could not be promoted by prolonging the life of Phair. Such contracts are so clearly contrary to public policy, that they can not be upheld, and must be declared absolutely void.

The judgment in this case must be reversed with costs of both courts.

The other justices concurred.

REMOVAL OF CAUSES — CONTROVERSY—PLEADING.

BAILEY v. AMERICAN CENTRAL INS. CO.

United States Circuit Court, District of Iowa.

It is not necessary for a non-resident to file an answer or a demurrer in the State court before petitioning for a removal of the cause to the Circuit Court of the United States, especially if the petition for removal be sworn to and states that there is a controversy, etc.

This is an action to recover damages upon a policy of insurance, and was originally instituted in the circuit court of Lee County, Iowa. The defendant, a non-resident corporation, appeared in the State court at the first term after the commencement of the suit, and without filing any other pleading presented its petition for a removal of the cause to this court. In the petition for removal the following statements appear: "Your petitioner, the defendant, would respectfully show the court that the matter and amount in dispute in the above entitled cause exceeds, exclusive of costs, the sum of $500; that the controversy in said suit is between citizens of different States; and that the petitioner was, at the commencement of this suit, and still is, a citizen of the State of Missouri; and that the said Noah Bailey was then, and still is, a citizen of Iowa."

Good and sufficient bond being tendered, the State court sustained the motion to remove the cause, and the record has accordingly been filed in this court. The plaintiff moves to remand, upon the ground that, at the time of the filing of the petition for the romoval in the State court, there was no controversy between the parties.

Hagerman, McCrary & Hagerman, for plaintiff; *Fulton & Fulton*, for defendant.

McCRARY, Circuit Judge, delivered the opinion of the court:

The act of Congress of March 3, 1875, under which this case was removed, provides for the removal of causes "where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, * * * * in which there shall be a controversy between citizens of different States. It is insisted by the counsel for plaintiff that, inasmuch as no answer or demurrer was filed in the State court, and no issue joined, we are bound to presume that there was no controversy in the case. That there must be a controversy in order to authorize the removal, is, of course, clear; and if it appears affirmatively from the record that there was no controversy, then the cause should be remanded. Keith v. Levi, 1 McCrary, 343. But we are inclined to think that, where nothing to the contrary appears, the court ought to presume from the fact that a suit has been commenced, that there is a controversy between the parties. If the detendant has made a default, or if, having appeared, he has admitted the justice of the plaintiff's claim, in either case there is no controversy; but where the plaintiff has brought his suit and the defendant has appeared, and, not being in default for want of pleading, has petitioned for a removal, under the act of Congress, we think we are bound to presume that there is a controversy. The presumption in every case is, where a suit is brought, that there is a controversy between the parties, unless the contrary appear from the record. This was the view of the subject, evidently taken by Congress in the enactment of the third section of the act above cited. By that section it is provided "That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a State court to the circuit court of the United States, he or they may make and file a petition in such suit in such State court before or at the term at which said cause could be first tried," etc. In very few if in any of the States of the Union, are there any statutes authorizing the filing of an answer before the first term. There is no such statute in this State, and inasmuch as the act of Congress expressly authorizes the petition for removal to be made before the term at which the case could be first tried, it follows that the petition may in many cases be presented before any answer or demurrer is authorized to be filed. Besides, we are both of the opinion that it affirmatively appears from this record that there is a controversy. The petition for removal distinctly so states and it is sworn to. There is certainly nothing in the statute requiring that the fact of a controversy shall appear either by an answer or a demurrer. If it appears from the record, whether by the petition for removal or otherwise, it is sufficient.

The case of Stanbrough v. Griffin, 52 Iowa, 112, is relied upon by the counsel for plaintiff. In that case Rothrock, J., expresses the opinion that a removal is not authorized in a case where there is no answer or demurrer, and the record does not show that there is a controversy between the parties. The question whether the petition for removal was sufficient to show the controversy was not considered in that case; and indeed the point was not necessary to be decided, and the remarks of the judge concerning it are *dicta*. Notwithstanding our high regard for the Supreme Court of Iowa, we are unable to concur in the view expressed by Rothrock, J., on this question.

The motion to remand is overruled.

LOVE, J., concurs.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES

October Term, 1880.

TARIFF—KNIT GOODS—HOSIERY.—The question in this case is whether stockings of worsted, or worsted and cotton, made on frames, and worn by men, women, and children, imported after the Revised Statute went into effect, June 22, 1874, are dutiable as knit goods, under schedule L, class 3, section 2,504, or as stockings, under schedule M. The two provisions under which the parties make their respective claims are as follows: *Sched. L.*—"Flannels, blankets, hats of wool, knit goods, balmorals, woolen and worsted yarns, and all manufactures of every description composed wholly or in part of worsted, the hair of the alpaca, goat, or other like animals, except such as are composed in part of wool, not otherwise provided for, valued at not exceeding forty cents per pound: twenty cents per pound; valued at above forty cents per pound and not exceeding sixty cents per pound: thirty cents per pound; valued at above sixty cents per pound and not exceeding eighty cents per pound; forty cents per pound; valued at above eighty cents per pound: fifty cents per pound; and, in addition thereto, upon all the above named articles, thirty-five per cent. *ad valorem*. *Sched. M.*—"Clothing, ready made, and wearing apparel of every description, of whatever material composed, except wool, silk, and linen, made up and manufactured wholly or in part by the tailor, seamstress, or manufacturer, not otherwise provided for, caps, gloves, leggins, mitts, socks, stockings, wove shirts and drawers, and all similar articles, made on frames, of whatever material composed, except silk and linen, worn by men, women, or children, and not otherwise provided for, articles worn by men, women, or children, of whatever material composed, except silk and linen, made up wholly or in part by hand, not otherwise provided for: thirty-five per centum *ad valorem*." In United States v. Bowen, 100 U. S. 513, we held that the revised statutes must be treated as a legislative declaration of what the statute law of the United States was on the 1st of December, 1873, and that when the meaning was plain the courts could not look to the original statutes to see if Congress had erred in the revision. That could only be done when it was necessary to construe doubtful language. We applied this rule in Arthur v. Dodge, 101 U. S. 36, to the construction of the revision of the tariff laws. It is also well settled that when Congress has designated an article by its specific name and imposed a duty on it by such name, general terms in a later act, or other parts of the same act, although sufficiently broad to comprehend such article, are not applicable to it. Movius v. Arthur, 95 U. S. 144; Arthur v. Leary, 96 U. S. 112. It is conceded that stockings made on frames have been dutiable *eo nomine* since 1842, and by four different statutes: 5 Stat. 549, chap. 270, sec. 1, subdivisions seven and nine; 9 Stat. 44 chap. 74 sec. 41, sched. C; 12 Stat. 194, chap. 68, sec. 22; Id., 556, chap. 163, sec. 2. Now, when we find, as we do in schedule M of section 2,504, "stockings * * * made on frames, of whatever material composed, except silk and linen, worn by men, women, and children," it seems to us clear beyond question that, goods coming within that specific description are dutiable in the way thus provided, rather than as "knit goods * * * composed wholly or in part of worsted." It may be true, as suggested, that if there had been no revision, and we are required to construe the statutes as they stood before December 1, 1873, a different conclusion might have been reached. We have not deemed it necessary to institute such an inquiry, for it would be contrary to all the rules of construction to say that where in one part of a section of a statute it was provided that "stockings made on frames, of whatever material composed, except silk or linen," should pay duties at a certain rate, it was not plain such articles were not in any just sense "otherwise provided for" in a preceding clause of the same section fixing the duties to be paid on "knit goods composed wholly or in part of worsted." The judgment below was before United States v. Bowen, *supra*, was decided here. The judgment is reversed and a *venire de novo* awarded. In error to the Circuit Court of the United States for the Southern District of New York. Opinion by Mr. Chief Justice WAIT.—*Vetor v. Arthur.*

REHEARING — MUNICIPAL CORPORATION — SUBSCRIPTION TO RAILROAD STOCK.—We do not perceive that the petition for rehearing in behalf of the county of Morgan contains any suggestion which was not pressed upon our attention in oral argument, as well as in the printed briefs heretofore filed. All that counsel said was carefully considered by us. But there were one or two matters, not distinctly covered by our opinion, to which we may properly refer. A rehearing is asked to the end that a complete record of the suit, in the Circuit Court of the United States for the Southern District of Illinois, of Studwell, Hopkins and Cobb, Trustees, v. Morgan County, etc., may be obtained and embodied in the transcript of the present case. If the record of that case was here, it could be of no use to the county. The decree therein is not pleaded for any purpose. Further, it is apparent, as well from the printed arguments filed in this court, for and against the county, as from the testimony of the witnesses who refer to the case in the circuit court, that the suit of Studwell, etc. v. Morgan County, etc., was dismissed by the complainants therein, and that there was no adjudication upon the merits. The decree of dismissal in that suit, therefore, concluded none of the parties to it, even were it conceded that the trustees had authority, by virtue of their position, to represent the present appellees in any litigation in Morgan County

touching its liability to creditors of the Illinois River Railroad Company. We did not, as counsel seem to suppose, overlook the argument based upon the subscription made by the city of Jacksonville. That subscription, as matter of law, was wholly disconnected from the subscription made by the county, and we could not regard the former as payment, in whole or in part, of the latter, without assuming to make for the parties a contract which they did not choose to make for themselves. If, as urged, the result is unfortunate for the county, we can only say, what can not be too often repeated, that hard cases can not be permitted to make bad law. The rehearing is denied. Appeal from the Circuit Court of the United States for the Southern District of Illinois. Opinion by Mr. Justice HARLAN.—*Morgan County v. Allen.*

SUPREME COURT OF MISSOURI.

June, 1881.

INDICTMENT—INDORSING NAMES OF MATERIAL WITNESSES THEREON—TWO ASSAULTS IN SAME COUNT—VENUE — CONFESSIONS — CORPUS DELICTI—INSTRUCTIONS.—It is no ground of objection that the names of the material witnesses for the State were not indorsed upon the indictment, and the only result of such failure is that no continuance on account of the absence of such witnesses will be granted the State, except upon the affidavit of the prosecuting attorney. § 1802, R. S.; State v. Nugent, 71 Mo. 136. It was proper to charge two or more assaults in the same count, if this was in accordance with the facts. 3 Chitty's Cr. Law, 764, 777; Com. v. Stafford, 12 Cush. 619; People v. Davis, 56 N. Y. 100. And it was equally competent to charge that death occurred as the result of several mortal wounds, without specifying which one caused death. State v. Draper, 65 Mo. 385. It was not error to refuse to remand the cause to Morgan county, notwithstanding a change of venue had previously been taken to that county on a former indictment for the same offense; the circuit court of Morgan county was possessed of the cause, but that did not prevent the grand jury of Henry county from preferring a second indictment; and the indictment pending in Morgan county circuit court had been *nolle prosequied* anterior to the trial in Henry county. This ruling did not deny to defendant the right of change of venue, as he could have made application and been awarded a change, if there had been reason for it. The law is settled now that, in order to render a confession inadmissible, it must be made to an officer of the law in consequence of improper influence exerted by him. 1 Am. Cr. Law, §§ 686, 692 and cases cited; Whart. Cr. Ev., § 651. Nor does it make any difference that the feet of the prisoner were tied when the confessions were made. Franklin v. State, 28 Ala. 9. It is sufficient to establish the *corpus delicti*, that extra-judicial confessions be corroborated by circumstantial evidence sufficient to satisfy the minds of the jury. State v. Lamb, 28 Mo. 218; People v. Badgely, 16 Wend. 53; Daniel v. State, 63 Ga. 339. An instruction, though incorrect, if it does not operate prejudicially to defendant, is not reversible error. Where the evidence does not warrant it, the court should not instruct for murder in the second degree. State v. Hopper, 71 Mo. 425; State v. Talbott, decided this term. Affirmed. Opinion by SHERWOOD, C. J.—*State v. Patterson.*

DEED OF TRUST—FORECLOSURE — PARTIES—EVIDENCE.—A and J, minors, owned the undivided two-thirds in certain real estate, and C F A the remaining third thereof. On the 30th of June, 1868, A and J, by their guardians, sold their interest to defendants, K and G; and on the same day C F A sold his undivided third to the same defendants for $1,950, and executed a deed to them acknowledging the receipt of the purchase money—said deed being filed July 8, 1868. On the day of the purchase, defendants executed to F, trustee, a trust deed of the undivided third conveyed by C F A to secure the notes representing the unpaid purchase money, which deed was filed for record Dec. 7, 1868. On July 2, 1868, K borrowed from defendant L. $1,000, payable in two years, and executed to her a deed of trust on his undivided one-half of the entire property bought by him and G; which deed was filed for record July 8, 1868. In March, 1871, S became the owner of the notes secured by deed of trust to F. On May 17, 1872, F and C F A executed and delivered to G a deed releasing his interest in the property sold by him to K and G, from the trust deed executed by them to F as trustee to secure the unpaid purchase money. On the 2d of December, 1872, judgment of foreclosure of the trust deed executed by K to L was rendered in the circuit court; and on the 19th of February, 1873, the property mortgaged was sold by the sheriff to L, and a deed executed and acknowledged for the same by the sheriff, on the 18th of Dec., 1873. On June 17, 1873, in an *ex parte* proceeding by S, G, C F A and F, a decree was rendered cancelling the release executed by C F A and F on the ground of mistake. In April, 1874, this suit was commenced by the guardians of A and J against K, G and L, to foreclose a vendor's lien upon the undivided two-thirds sold by them. After the service of process, S was on her motion, and against the objection of defendants, made a party defendant. There was evidence tending to show that L took her trust deed from K with notice of the previous trust deed to F by K and G, and that the notes given by them to F were paid before the release was executed. The court rendered a decree of foreclosure in favor of the plaintiffs, and in favor of S against L foreclosing the trust deed on the one-third purchased by K and G of C F A. From

the decree in favor of S the defendant L has appealed. *Held*, that S was neither a necessary, nor a proper party to this suit. She had no interest in common with the plaintiffs, and no claim to a vendor's lien on the property which the plaintiffs sought to subject to the satisfaction of the lien, and she had no right to come in and seek a foreclosure of her trust deed in that suit, L. having bought under the judgment of foreclosure after the deed of release by C. F. A., and F was entitled to hold the interest of K. in the undivided third acquired from C. F. A., unless she had notice that such release had been executed by mistake, of which there is no evidence to show, and the judgment of the circuit court cancelling this release to which she was no party, was improperly admitted in evidence against her. Reversed and remanded. Opinion by HOUGH, J.—*Dugge etc. v. Kirchman.*

FERRY FRANCHISE—INFRINGEMENT—DEFINITION.—Plaintiff sued defendant before a justice of the peace to recover a penalty for an infringement of plaintiff's ferry franchise. Plaintiff had judgment for $50, which was reversed on appeal by defendants to the circuit court. The following was the agreed statement of facts: Plaintiff was incorporated under an act of General Assembly of Missouri, of Feburary 20, 1865, and amended March 19, 1866, to operate a ferry from Alexandria, Mo. to Warsaw, Ill. for doing a legitimate ferry business. Defendants built a large flat boat, which they used to transport material exclusively for their own business as coopers, transferring hoop poles and other necessary material for their shops and nothing else. Section 5 of the plaintiff's charter provides that plaintiff shall have the exclusive ferry privilege between the points named, and that any person who should run a ferry and land within one and a half miles either above or below the centre of the Alexandria levee, should forfeit and pay to the ferry company $50 for each and every landing, to be recovered before a justice. *Held*, that the facts agreed upon do not bring plaintiff's case within the 5th section of its charter above, and that the legislature by the term ferry used in the act meant a legal ferry, which means where persons are "taken across a river or other streams in boats or other vessels for hire." Bouvier's Dictionary. 3 Wait's Actions and Defenses, 348. Affirmed. Opinion by NORTON, J.—*Alexandria etc. Ferry Co. v. Wish.*

SUPREME COURT OF KANSAS.

April 19, 1881.

IMPUTED NEGLIGENCE—FAILURE OF PARENTS TO KEEP TWO-YEAR-OLD CHILD AT HOME.—1 Where a child two years old strays away from his home, without the knowledge or consent of his parents, and goes upon a railroad track, which is about one hundred feet from his home, and within three minutes after leaving his home he is injured by a car belonging to the railroad company, running over him: *Held*, that it can not be said, as matter of law, that the failure of the parents to keep the child away from the railroad track was *per se* culpable negligence contributing to the injury. 2. Where a railroad track is constructed in a populous neighborhood, near a city, and children and others often go upon the track, and a portion of the track has a steep grade down which cars will run with great force when the brakes are loosened, and the persons operating the road loosen the brakes of a car loaded with coal and let it run down this steep grade, without any person being on the car, or any means of stopping it, and without first looking to see whether the track was clear, or whether any person was on the track, or not; and a child, who was on the track, was run over and injured; and there is a conflict in the evidence as to whether the child could have been seen by the persons operating the road before they loosened the brakes; *Held*, that the courts can not say, as a matter of law, that the persons operating the road were not guilty of negligence; but it is a question of fact which should be submitted to the jury. 3. Where a railroad company owns a switch track constructed from the main track to a coal shaft belonging to a mining company; and the railroad company furnishes cars to this mining company, to be loaded with coal, and when loaded permits the mining company to loosen the brakes of the cars, so that the cars will run down the steep grade of the switch track to a point where the track is level; and the mining company, after loading a certain car, negligently loosens the brakes thereof and allows the car to run down the steep grade of the switch track, and over a child, and thereby injures it: *Held*, that the railroad company is responsible for the injury. Reversed. Opinion by VALENTINE, J.—*Smith v. Atchison, etc. R. Co.*

BREACH OF CONTRACT—MEASURE OF DAMAGES.—S was the agent of O for the sale of certain machines, and was to receive $60 on each machine as a commission and compensation for selling the same. It was his duty to see that all the machines sold were properly set up and put in operation; and, according to the evidence, it would cost him about $20 to set up and put in operation each machine. He was entitled to receive five machines from O, but did not, in fact, receive any one of them: *Held*, that his measure of damages was the actual loss which he sustained, and was not necessarily $60 on each machine; therefore, *Held*, that the court below erred in instructing the jury substantially that the measure of his damages was $60 on each machine. Reversed. Opinion by VALENTINE, J.—*Osborne v. Stassen.*

INSTRUCTION — MODIFICATION—CUSTOM.—EVIDENCE.—1. Where a real estate broker and land agent at Paola, Kansas, sued the original owner

and vendor of certain land for a commission on the price of the land sold; and the evidence tended to show that the agent was to sell the land for $4,500 clear of commission, and also that he sold the land for just $4,500; and during the trial the defendant was permitted to ask a witness, who was competent to testify with regard to the matter, the following question: "When land is offered for sale clear of commission at a certain price, what is the custom at Paola?" and the witness answered as follows: "The custom is for the purchaser to pay the commission added to that price:" *Held*, not error. 2. Generally a trial court would commit error as against a party asking instructions, if it should modify them by interlineation, or otherwise, so that the modification might not readily be distinguished from the instructions as originally asked for; but where the court modifies instructions by interlineation, and the party asking them does not complain, and it is not shown what the interlineation was: *Held*, that the Supreme Court can not say that any error was committed. Affirmed. Opinion by VALENTINE, J.—*Campbell v. Fuller.*

QUERIES AND ANSWERS.

[**** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

16. In a suit by a physician for his fees defense is made, charging that his treatment was irregular and dangerous, and resulted in permanent injury to defendant and damages claimed. Issue being made upon these allegations, is the testimony of witnesses, cured by him by the same treatment given defendant, competent? B.

17. Can a surviving partner make an assignment for the benefit of creditors and therein make a preference of a creditor or creditors? If he can not, can the validity of said assignment be successfully attacked by an attaching creditor, or should a bill be filed to set aside the assignment and receiver appointed? When, in practice, as in Colorado, "the distinction between action at law and suits in equity is abolished," will the attachment prevail? J. M. E.
Denver, Col.

18. If A owns the fractional sections around a lake, and by drainage uncovers a strip one hundred feet in width around the lake, and afterwards sells the fractional sections by the description of his original purchase, and subsequently the lake becomes entirely dry—To whom does the lake bed belong—to A, or to the purchaser from him of the fractional sections?
Indianapolis, Ind. E. K. L.

RECENT LEGAL LITERATURE.

BRADWELL'S REPORTS. Reports of Decisions of the Appellate Courts of the State of Illinois. By James B. Bradwell. Vol. 7. Containing all the Remaining Opinions of the First, Second, Third and Fourth Districts, up to January 27, 1881. Chicago, 1881: Chicago Legal News Co.

As a matter of course, the reports of the decisions of inferior appellate courts are not of a great deal of interest without the limits of the State in which they are rendered. The present volume, however, like its predecessors, is very creditable to both reporter and publisher. The former has a faculty which is exceedingly rare in his craft, of saying a great deal in a small space, and his *syllabi* are really terse, succinct and comprehensive. A critical person might think that the reports contain the argument of counsel in too extended a form, though we believe that there is not more than the usual amount of such matter. Opinions may differ about this matter, but for our own part, we think that reports would usually be much improved by the entire omission of the briefs of counsel.

LEGAL DIRECTORY, 1881-1882. H. Campbell & Co.'s Hand-book for Business men; or Legal and Financial Directory, Containing a Catalogue of Responsible Lawyers, Located in all the Important Cities and Towns of the United States and Canada, for the Collection of Claims and the Expeditious Transaction of all Legal Business. Also a List of Banks and Bankers, together with a Compilation of Laws and Facts Important to every Business Man. Laws Compiled by Charles S. Withington. New York, 1881: H. Campbell & Co.

This little book was intended, as indicated by its title, rather for the use of business men than of lawyers; yet some of the gentlemen of the bar, whose business consists to any considerable extent of collections, may find it useful.

It consists of three parts, to-wit: 1. A compilation of the collection laws of each of the States. 2. A list of the lawyers, giving the name of at least one attorney in each town of any importance in the country. 3. A similar list of banks.

Of course, it is impossible to form a definite opinion of the value of such a book from an inspection of it. All depends upon the degree of care and good faith with which the work has been done, and this can only be determined by continued practical use. The compilation of laws we do not esteem of much practical value. It is too technical for the use of the business man, and not enough so for that of the lawyer. Of the lists of attorneys and banks we can say that, having reference to those towns with which we happen to be familiar, responsible

names only are given. A work of this character, however, must make its own market by its approved usefulness. Criticism, however fair and careful, can be of but little use in determining its value.

QUESTIONS ON KENT. — Questions on Kent's Commentaries with References to Illinois Statutes and Decisions, where the Law of the State differs from that laid down in the Text. By Reuben A. Benjamin, Professor of Law in the Illinois Wesleyan University. Chicago, 1880: Chicago Legal News. Co.

This little book will be of service to the student and young practitioner. The feature of references to the State statutes and decisions in cases where the law as stated in the text, has been altered is a good one. We believe a great, if not the greatest, difficulty which is met with by the young practitioner, when he seeks to make a practical application of the principles which he has taken so much pains to acquire is, to know how far they remain in force, and whether the rule in any given case has been abrogated by statute, or gradually modified by the course of decisions.

The plan of the work is fair and somewhat original. We can not, however, give an unqualified approval to the execution of it. The questions are mechanically and inartificially framed, following the wording of the sections rather than developing the thought. The consequent tendency would naturally be to a parrot-like study of words, rather than of the principle embodied.

NOTES.

——The United States Senate authorized its Committee on the Judiciary to sit, during the recess of Congress, to consider the question of establishing a uniform bankruptcy law. A circular inviting the opinion of merchants was sent by Senator Ingalls, chairman of the sub-committee, to commercial bodies throughout the country. D. C. Robbins, of McKesson, Robbins & Co., chairman of the Special Committee on Bankruptcy Laws, of the Chamber of Commerce, of New York, in a reply upon the subject, says:

All our past bankrupt acts did encourage insolvency, and their repeal became a necessity. In any measure that may be adopted hereafter, as compared with the law of 1867, we are of opinion that the officers should be compensated by fixed salaries as far as possible; that the powers of the Registers should be increased; that the amount of indebtedness authorizing the filing of a petition in voluntary bankruptcy, should exceed $300—should be at least $1,000; that composition settlements should be continued only under court control over the discharge of the bankrupt; that the discretionary power of the court relating to the granting of discharges, should be greatly enlarged. Composition settlements should be continued, but they should be carefully guarded; and a discharge in settlement through composition should never be allowed without the approval of the court, as well as a majority of the creditors in number and three-fourths in value. We want a simple law to be executed by a responsible court, with salaried officials as far as possible; and a discharge of the bankrupt should never proceed from the creditors. To allow a portion of the creditors of a bankrupt to discharge the party from obligation to all his creditors is both unwise and unjust—it is as absurd as to allow the settlement of crime or theft by compromise without judicial examination. Every attempt to construct a bankruptcy law in this country and Great Britain, by dispensing with court supervision over the discharge of the bankrupt, has proved a failure.

Mr. Robbins criticises the laws of Great Britain, and also some of the provisions of the Lowell bill, which he does not think wise to adopt. In conclusion he says:

We beg to express an earnest desire that your committee will not recommend any bankrupt act that does not provide for court supervision over all discharges in bankruptcy. It is more necessary in bankruptcy settlements that a proper distinction be recognized between integrity and dishonesty, than that the utmost dividend be obtained for the creditor; and all experience has proven that this discrimination can not be safely intrusted to the creditor, as the creditor is principally intent upon his dividend.

——Brett, L. J., said, in a bankruptcy case: "I am sorry to say that I am not shocked, because I am too old to be shocked at anything, but certainly a viler fraud I have never heard of." *Ex parte* Griffin, 41 L. T. R. (N. S.) 515.

——A certain manufacturer, who had made a composition with his creditors, was under cross-examination at the assizes, "Now, sir," cried Mr. Bagwig, ferociously, "attend to me! Were you not in difficulties a few months ago?" "Noa." "What, sir? Attend to my question. I ask you again—and pray be careful in answering, for you are upon your oath. I need hardly remind you—were you not in difficulties some months ago?" "Noa—not as I knows of." "Sir, do you pretend to tell this court that you did not make a composition with your creditors a few months ago?" "Oh, ah," a bright smile of intelligence spreading over the ingenuous face of the witness, "that's what you mean, is it? But, ye see, it were my creditors as were i' difficulties then, an' not me."

——A western constable held an execution against a farmer, and when he called for a settlement, the agriculturist took him out into a big pasture and pointed out a wild steer as the particular piece of property that should be levied upon. The constable chased the steer around for a while, and then sat down, and taking out his book began to write. "What are you doing there?" asked the granger. "Charging mileage," replied the constable, without looking up. "Do I have it all to pay?" gasped the rancher. "You bet." "Then take this tame heifer here. I can't stand any such game as that."